Jamboi ak Linggoh & Ors v Wawasan Sedar Sdn Bhd & Ors

HIGH COURT (BINTULU) — SUIT NO BTU-21–1/2 OF 2012
JOHN KO WAI SENG JC
24 JULY 2012

Civil Procedure — Striking out — Application to strike out action — Claim for native customary rights over land — Res judicata — Whether plaintiffs were precluded by res judicata from bringing new suit on same subject matter — Whether action frivolous and vexatious or abuse of process of court

In an earlier suit ('the first suit') the first, fifteenth and twenty-fifth plaintiffs ('the original plaintiffs') had claimed that they had acquired native customary rights ('NCR') over an approximate 2,323 hectares of lands situated in Bintulu, Sarawak ('the NCR land') and that the issuance of provisional leases to the first and second defendants, which allegedly covered the original plaintiffs' NCR land, was unlawful. The original plaintiffs had filed the first suit for and on behalf of themselves and 35 other occupiers of the NCR land. By way of the first suit the original plaintiffs had sought, inter alia, a declaration that the issuance of the provisional leases to the first and second defendants was null and void for want of extinguishment of the plaintiffs' NCR over the land; or alternatively the issuance of the provisional leases was subject to the plaintiffs' NCR over the land. Subsequently, by a consent order the court ordered that the first suit be struck out without liberty to file afresh and with no order as to costs. Later, the first, fifteenth and twenty-fifth plaintiffs together with 26 other plaintiffs took out a fresh suit ('the present suit') against the same defendants claiming NCR over the lands situated in Bintulu, Sarawak ('this suit's land'). The plaintiffs in the present suit sought similar relief as in the first suit. The defendants submitted that the plaintiffs were precluded by res judicata from bringing a new suit on the same subject matter. The defendants thus applied to strike out the plaintiffs' claim on the grounds that it was an abuse of process for the plaintiffs to bring a new suit on the same subject matter when they were bound by the consent order. The plaintiffs submitted that there was no res judicata by the consent order as the capacity and the subject matter in the two suits were different. The plaintiff claimed that the first suit was brought as a representative action for all members who had a common intention, whereas in the present suit the plaintiffs were bringing the action on their own behalf against the defendants.

Held, allowing the defendants' application to strike out claim with costs:

(1) The plaintiffs had not rebutted the fact that the twenty-nine claimants in

the present suit were the same or were not represented by the plaintiffs of the first suit. The fact of the presence of the first, fifteenth and twenty-fifth plaintiffs who were named as the original plaintiffs in a representative capacity in the first suit led to the conclusion that the parties in the present suit were meant to be included in the first suit by the representative capacity of the original plaintiffs (see para 19).

(2) The nature of the claim in the first suit and the claim in the present suit were grounded on 'temuda land', which was allegedly located within the boundary of the plaintiffs' communal lands. The original plaintiffs in the first suit which included the first, fifteenth and twenty-fifth plaintiffs in the present suit had agreed by the consent order in the first suit that their NCR over 'temuda land' be struck out without liberty to file afresh. The consent order would thus preclude the plaintiffs from filing a new suit on the same subject matter, ie claiming NCR over this suit's land as 'temuda' land. The plaintiffs were bound by res judicata (see paras 21, 32–33 & 35).

(3) It was an abuse of court process to allow the plaintiffs who had sued in a representative capacity in the first suit in respect of the same subject matter to then file afresh the present suit. In the circumstances, the plaintiffs' present suit was frivolous and vexatious or an abuse of the process of the court and ought to be struck out. This suit could also be struck out by the court exercising its inherent jurisdiction (see paras 36–37).

[Bahasa Malaysia summary

Dalam guaman terdahulu ('guaman pertama') plaintif pertama, ke-15 dan ke-25 ('plaintif-plaintif asal') mendakwa bahawa mereka telah memperolehi hak adat ke atas tanah yang dianggarkan berukuran 2,323 hektar yang terletak di Bintulu, Sarawak ('tanah hak adat') dan bahawa pengeluaran pajakan sementara defendan pertama dan kedua, yang didakwa meliputi tanah hak adat plaintif-plaintif asal, menyalahi undang-undang. Plaintif-plaintif asal telah memfailkan guaman pertama untuk dan bagi pihak mereka sendiri dan 35 penghuni-penghuni tanah hak adat yang lain. Melalui guaman pertama, plaintif telah memohon, antara lain, suatu perisytiharan bahawa pengeluaran pajakan sementara kepada defendan pertama dan kedua adalah batal dan tidak sah kerana tiada penghapusan hak adat plaintif-plaintif ke atas tanah; atau secara alternatifnya, bahawa pengeluaran pajakan sementara adalah tertakluk kepada hak adat plaintif-plaintif ke atas tanah. Seterusnya, melalui perintah persetujuan, mahkamah memerintahkan agar guaman pertama dibatalkan tanpa kebebasan untuk memfailkan semula dan tanpa perintah terhadap kos. Kemudian, plaintif pertama, ke-15 dan ke-25 bersama-sama dengan 26 plaintif-plaintif lain memulakan guaman baru ('guaman ini') terhadap defendan-defendan yang sama, menuntut hak adat ke atas tanah-tanah yang terletak di Bintulu, Sarawak ('tanah dalam guaman ini'). Plaintif-plaintif dalam

guaman ini memohon relief-relief yang sama seperti dalam guaman pertama. Defendan menghujahkan bahawa plaintif-plaintif terhalang oleh *res judicata* daripada memulakan guaman baru berdasarkan perkara yang sama. Dengan itu, defendan memohon untuk membatalkan tuntutan plaintif-plaintif atas alasan bahawa ia merupakan penyalahgunaan proses untuk plaintif-plaintif memulakan guaman baru berdasarkan perkara yang sama sedangkan mereka terikat dengan perintah persetujuan. Plaintif-plaintif menghujahkan tidak berlaku *res judicata* oleh perintah persetujuan kerana kapasiti dan perkara dalam kedua-dua guaman adalah berbeza. Plaintif-plaintif menghujahkan bahawa guaman pertama telah dimulakan sebagai wakil tindakan bagi kesemua ahli-ahli yang mempunyai niat bersama, sedangkan dalam guaman ini, plaintif-plaintif telah memulakan tindakan bagi pihak mereka sendiri terhadap defendan.

Diputuskan, membenarkan permohonan defendan untuk membatalkan tuntutan dengan kos:

(1) Plaintif tidak menyangkal fakta bahawa kesemua 29 pihak yang menuntut dalam guaman ini adalah sama atau tidak diwakili oleh plaintif-plaintif dalam guaman pertama. Fakta kehadiran plaintif pertama, ke-15 dan ke-25 yang telah dinamakan sebagai plaintif-plaintif asal dalam kapasiti wakil dalam guaman pertama membawa kepada kesimpulan bahawa pihak-pihak dalam guaman ini bertujuan untuk dimasukkan dalam guaman pertama melalui kapasiti perwakilan plaintif-plaintif asal (lihat perenggan 19).

(2) Sifat tuntutan dalam guaman pertama dan tuntutan dalam guaman ini berasaskan pada 'tanah temuda', yang didakwa terletak di sempadan tanah komunal plaintif-plaintif. Plaintif-plaintif asal dalam guaman pertama yang melibatkan plaintif pertama, ke-15 dan ke-25 dalam guaman ini telah bersetuju melalui perintah persetujuan dalam guaman pertama bahawa hak adat mereka ke atas 'tanah temuda' dibatalkan tanpa kebebasan untuk memfailkan semula. Perintah persetujuan tersebut menghalang plaintif memfailkan guaman baru berdasarkan perkara yang sama, iaitu menuntut hak adat ke atas tanah guaman ini sebagai tanah 'temuda'. Plaintif terikat dengan *res judicata* (lihat perenggan 21, 32–33 & 35).

(3) Adalah satu penyalahgunaan proses mahkamah untuk membenarkan plaintif yang telah menyaman dalam kapasiti perwakilan dalam guaman pertama bagi perkara yang sama, untuk kemudiannya memfailkan semula guaman ini. Dalam keadaan ini, guaman plaintif-plaintif adalah remeh dan menyusahkan atau merupakan penyalahgunaan proses mahkamah dan harus dibatalkan. Guaman ini juga boleh dibatalkan oleh mahkamah dalam menjalankan bidang kuasa sedia adanya (lihat perenggan 36–37).]

Notes

For cases on application to strike out action, see 2(4) *Malal's Digest* (4th Ed, 2012 Reissue) paras 7992–8012.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Chemfert Sdn Bhd & Anor v Hua Lim [2010] 5 MLJ 228; [2010] 7 CLJ 491, CA (refd)

Government of Malaysia v Dato Chong Kok Lim [1973] 2 MLJ 74; [1973] 1 LNS 35 (refd)

Henderson v Henderson (1843) 3 Hare 100 (refd)

Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors [1990] 3 MLJ 427; [1990] 2 CLJ (Rep) 169, HC (refd)

Malaysia National Insurance Sdn Bhd v Lim Tiok [1997] 2 MLJ 165; [1997] 2 CLJ 351, SC (refd)

Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd v Kenneth Godfrey Gomez & Anor [2011] 5 MLJ 219; [2010] 9 CLJ 702, CA (refd)

Perspective Management Services Sdn Bhd v Seganom Sdn Bhd [2004] 4 CLJ 466, CA (refd)

Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479; [2000] 1 CLJ 553, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 18 rr 19(1), (1)(a), (b), (c), (d), (2), O 92 r (4)

Simon Siah (Baru Bian & Co) for the plaintiff.
Ling Ching (Geogle Lo & Partner) for the first defendant.
Billy Wong (Stephen Wong Sibu) for the second defendant.
McWillyn Jok (State Attorney General's Chambers, Kuching) for the third defendant.

John Ko Wai Seng JC:

APPLICATION

[1] The first defendant had applied to strike out the plaintiffs' case under O 18 r 19(1) and O 92 r (4) of the Rules of the High Court 1980.

[2] Upon reading:

(a) writ of summons and statement of claim;

(b) the first defendant's summons in chambers dated 27 April 2012 ('application');

(c) the first defendant's affidavit in support affirmed on 15 March 2012 ('support affidavit');

(d) the plaintiffs' affidavit in opposition affirmed on 4 April 2012 ('opposing affidavit'); and

(e) the first defendant's affidavit in reply affirmed on 16 April 2012 ('reply affidavit');

and upon reading:

(a) the first defendant's submission;

(b) the plaintiffs' submission; and

(c) the first defendant's reply submission;

the court finds as follows.

FACTS OF CASE

[3] On 4 May 2010, TR Ro ak Amot, Robert ak Sada ('the 25th plaintiff'), Dingan ak Belon ('the 15th plaintiff') and Jambol ak Linggoh ('the first plaintiff') had respectively as the plaintiffs ('the original plaintiffs') sued the defendants in Bintulu High Court Suit No 21–03 of 2010 (BTU) (the 'first suit') (see exh WLC1 of support affidavit).

[4] The original plaintiffs in the first suit had sued for and on behalf of themselves and 35 occupiers, holders and the claimants of native customary right land ('NCR') at Rumah Ro, Sg Teban Ulu, Labang, Sebauh, Bintulu, Sarawak. The original plaintiffs through the statement of claim of the first suit (first statement of claim) claimed in para 4, inter alia:

(a) *The Plaintiffs claim that at all material times, they have acquired native customary rights over the lands at and/or surrounding Rumah Ro anak Amot, Sg Teban Ulu, Labang, Sebauh, Bintulu, Sarawak*. The said lands are more particularly set out in a map annexed herewith and marked 'M' and edged in red are the areas within which the Plaintiffs claim the said rights (hereinafter referred to as 'the said NCR Land')

(b) The Plaintiffs' native customary rights over the said NCR land are recognized under the Land Code Cap. 81 and/or the former Land Orders and/or Land Ordinances of Sarawak.

(c) From the said NCR Land, the Plaintiffs derive food, valuable medicines, wildlife and other forest produce for their livelihood and sustenance. They also cultivated padi, fruit trees, rubber, pepper, cocoa and other essential trees and crops thereon.

(d) *The said NCR Land, which is comprised of land and forest and/or high forest ('temuda', 'pulau' and 'pemakai menoa')* is not just a source of livelihood but also constitute life itself, as the said land is also fundamental to the Plaintiffs' social, cultural and spiritual survival as native people.

(e) That in 1956, the 4th Defendant's predecessor servant and or agent a Sarawak Administrative Officer (SAO) by the name William Linang, gave recognition of the Plaintiffs' occupation of the said NCR Land ('Surat Pemakai Menoa') by issuing a letter to that effect. (Emphasis added.)

[5] In other words, the original plaintiffs had at all material times, acquired native customary rights over the lands at and or surrounding Rumah Ro ak Amot, Sg Teban Ulu, Labang, Sebauh, Bintulu, Sarawak ('NCR land'). A map showing the extent of the boundary of the NCR land with an approximate area of 2,323 hectares was attached to the first statement of claim as Map M ('Map M1') and the encroachment of the defendants into the top portion of the NCR land with an approximate area of 98 hectares (the first suit's land) is shown in Map M1.

[6] By a consent order made on 9 November 2011 in respect of the first suit (exh WLC2 of support affidavit), the court ordered that the first suit be struck out without liberty to file afresh and with no order as to costs ('consent order').

[7] On 9 February 2012, the first, 15th and 25th plaintiffs (except TR Ro ak Amot) together with the 26 other plaintiffs took out a fresh suit ('this suit') against the same defendants claiming NCR over the lands located at Sungei Seramas, Rumah Robin Ro, Sg Teban, Ulu Labang, Sebauh, 97100 Bintulu, Sarawak ('this suit's land'). A map showing the extent of the boundary of this suit's land is attached to the statement of claim as Map M ('Map M').

[8] The nature of the plaintiffs' claim in the statement of claim in this suit is set out in para 4 of the statement of claim, inter alia:

(a) *The Plaintiffs claim that at all material times, they have acquired native customary rights over the lands located at Sungei Seramas, Rumah Robin Ro, Sungei Teban, Ulu Labang, Sebauh, 97100 Bintulu, Sarawak*. The said lands are more particularly set out in a map annexed herewith and marked with numbers identifying each parcel in the area shaded Green in the locality map marked as 'M' (hereinafter referred to as 'the said NCR Lands')Particulars

Plaintiffs	I.C. No.	Lot	Acreage
1. Jamboi Ak Linggoh	(550505-13-5215)		
2. Mark Ak Jamboi	(970915-13-6561)	1	25
3. Francis Ak Belitang	(540216-13-5323)		

4. Maradona Ak Francis	(821001-13-5221)	2	4.8
5. Tit Ak Belon	(480904-13-5043)	3	2.1
6. Junit Anak Jimbau (f)	(730402-13-5683)	4	10.9
7. Kayang Ak Awang	(371005-13-5055)	5	21.2
8. Rebena Ak Dingun (f)	(741201-13-5664)		
9. Perit Ak Ambah (f)	(710814-13-5331)	6	4.1
10. Wilson Nyabong Ak Ijang	(590608-13-5417)	7	21.2
11. Ginda Ak Gani	(660716-13-5263)		
12. Sunah Ak Jimbau (f)	(640905-13-5088)	8	6.2
13. Janet Ak Gerempong (f)	(820726-13-5988)		
14. Margret Ak Gerempong (f)	(871109-52-6334)	9	9.2
15. Dingun Anak Belon	(460216-13-5365)		
16. Jinggung Ak Dingun	(680912-13-5509)	10	30.4
17. Gerempong Ak Ngua	(590612-13-5639)	11	4.6
18. Edward Ak Kayang	(710913-13-5281)	12	24.5
19. Ubong Ak Andong	(631005-13-5045)		
20. Serawa Ak Antom (f)	(400318-13-5064)	13	5.2
21. Adwin Lim	(RF137985)		
22. Runai Ak Sanai (F)	(620905-13-5098)	14	8.1
23. Richard Nga Ak Galau	(460921-13-5469)	15	16.7
24. Sada Ak Ungka	(461006-13-5196)		
25. Robert Ak Sada	(770315-13-5673)	16	10.9
26. Anting Ak Rundang	(670702-13-5675)		
27. Jenri Ak Jimbau (F)	(690717-13-5756)	17	3.2
28. Ampak Ak Serang (F)	(391110-13-5426)	18	14.1
29. Legai Ak Jabing	(650908-13-5177)	19	11

(b) The plaintiffs' native customary rights over the said NCR Lands are recognized under the Sarawak Land Code (Cap 81) 1958, and/or the former Land Orders and/or Land Ordinances of Sarawak.

(c) From the said NCR Lands, the plaintiffs derive food, valuable medicines,

wildlife and other forest produce for their livelihood and sustenance. They also cultivated padi, fruit trees, rubber, pepper, cocoa and other essential trees and crops thereon. A

(d) *The said NCR Lands, which is comprised of farmed land or 'temuda', and which is located within the boundary or 'garis menua' of the Plaintiffs' communal lands locally referred to as 'pemakai menua'*, is not just a source of livelihood but also constitute life itself, as the said land is also fundamental to the plaintiffs' social, cultural and spiritual survival as native people. B

(e) That in 1956, the 4th defendant's predecessor servant and or agent a Sarawak Administrative Officer (SAO) by the name William Linang, gave recognition of the plaintiffs' occupation of the said NCR Land ('Surat Pemakai Menoa') by issuing a letter to that effect. (Emphasis added.) C

[9] The 39 plaintiffs in the first suit appears to reside in and belong to the same longhouse Rumah Ro ak Amot at Sg Teban Ulu, Labang, Sebauh, Bintulu, Sarawak as the 29 plaintiffs in this suit which is Rumah Robin Ro, Sungei Teban, Ulu Labang, Sebauh, 97100 Bintulu, Sarawak according to the reply affidavit which has not been denied. D

[10] According to the first defendant's map (exh 'WLC3' of support affidavit) in relation to Map M, the parcel of land located at the top portion of the NCR land claimed in this suit by the plaintiffs is smaller (approximately 94 hectares) than the NCR land in the Map M1 but it falls entirely within the area of Map M1 for which relief is claimed by the original plaintiffs against the first defendant in para vii of the prayers in the first statement of claim. E F

[11] The relevant prayers claimed by the original plaintiffs in their first statement of claim are as follows:

(i) A Declaration order that *the Plaintiffs had created and/or acquired and/or inherited Native title and/or Native Customary Rights (NCR) over the area as claimed by the Plaintiffs referred to and/or edged in Orange marked in the locality map marked as 'M'* (or Map M1) *annexed hereto* ('the said NCR Lands'); G

(ii) A Declaration that this native title and/or rights precludes the 1st Defendant from impairing and/or abridging the Plaintiffs' said native title and/or NCR; H

(iii) …

(iv) A Declaration order that the issuance of the said Provisional Leases to the 1st and 2nd Defendant respectively, in as far as the extent of that area under the said Provisional Leases overlaps and/or covers the Plaintiffs' NCR Land is unlawful, improper, unconstitutional and therefore null and void, for want of extinguishment of the Plaintiffs' NCR over the said Land; I

(v) Alternatively, a Declaration that the issuance of the said Provisional Leases was subject to the native title and/or native customary rights and/or usufructurary rights of the Plaintiffs in or over the said NCR Land and that the said Provisional Lease do not affect the Plaintiffs' said title and/or rights there;

(vi) …

(vii) *A Declaration order that the area so included in the said Provisional Leases respectively, as claimed by the Plaintiffs as part of their NCR Land, as shown in map 'M1' annexed to this Statement of Claim, the same be excised out of the area of land under the said respective Provisional Lease*;

(viii) A prohibitory injunction restraining the 1st and 2nd Defendants and/or their employees, servants and/or agents from trespassing, clearing, using or occupying and commencing their development project on the Plaintiffs' said NCR Land;

(ix) Alternatively, a mandatory injunction against the 1st and 2nd Defendants and/or its employees, servants and/or agents to cease operations and remove all structures and their equipments or machineries from the Plaintiffs' said NCR Land forthwith;

(x) Damages to be assessed by the Registrar;

(xi) Costs of this action; and

(xii) Any further order or relief deems fit and proper by this Honourable Court. (Emphasis added.)

[12] The relevant prayers claimed by the plaintiffs in their statement of claim here are as follows:

(i) Declaration order *that the Plaintiffs had created and/or acquired and/or inherited Native title and/or Native Customary Rights (NCR) over the area as claimed by the Plaintiffs respectively referred to and/or marked and numbered parcel, in the area shaded Green in the locality map marked as 'M' annexed hereto* herein;

(ii) A Declaration that this native title and/or rights precludes the 1st Defendant from impairing and/or abridging the Plaintiffs' said native title and/or NCR;

(iii) …

(iv) A Declaration order that the issuance of the said Provisional Leases to the 1st and 2nd Defendant respectively, in as far as the extent of that area under the said Provisional Leases overlaps and/or covers the Plaintiffs' NCR Land is unlawful, improper, unconstitutional and therefore null and void, for want of extinguishment of the Plaintiffs' NCR over the said Land;

(v) Alternatively, a Declaration that the issuance of the said Provisional Leases was subject to the native title and/or native customary rights and/or

usufructurary rights of the Plaintiffs in or over the said NCR Land and that the said Provisional Lease do not affect the Plaintiffs' said title and/or rights there;

(vi) …

(vii) *A Declaration order that the area so included in the said Provisional Leases respectively, as claimed by the Plaintiffs respectively as their NCR land, the same be excised out of the area of land under the said Provisional Leases*;

(viii) A prohibitory injunction restraining the 1st and 2nd Defendants and/or their employees, servants and/or agents from trespassing, clearing, using or occupying and commencing their development project on the Plaintiffs' said NCR Land;

(ix) Alternatively, a mandatory injunction against the 1st and 2nd Defendants and/or its employees, servants and/or agents to cease operations and remove all structures and their equipments or machineries from the Plaintiffs' said NCR Land forthwith;

(x) Damages to be assessed by the Registrar;

(xi) Costs of this action; and

(xii) Any further order or relief deems fit and proper by this Honourable Court. (Emphasis added.)

STRIKING OUT: RES JUDICATA

[13] The first defendant relies on res judicata arising from the consent order from the first suit in stopping the plaintiffs from commencing this suit.

[14] The court notes that under O 18 r 19(1)(a) by r (2) of the RHC 1980, no affidavit evidence is admissible here but affidavit evidence is admissible under r 19(1)(b)–(d). The first defendant application is framed under O 18 r 19(1)(d) as an abuse of process by virtue of res judicata.

[15] Sharma J in *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74; [1973] 1 LNS 35 had succinctly stated the law on res judicata as follows:

> The following classic passage from the judgment of Sir William de Grey found in *The Duchess of Kingston*'s case 1 Smith's leading cases (13th Ed), 644 is a statement of the leading principles of res judicata:-
>
> > From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner,

> conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment.

(See also *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783, (SC) at p 791; *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479; [2000] 1 CLJ 553, (CA); and *Chemfert Sdn Bhd v Hua Lim* [2010] 5 MLJ 228; [2010] 7 CLJ 491).

[16] Applying the law, the court finds that there is no issue of the exclusiveness and conclusiveness of the consent judgement as it emanated from this High Court. The defendants are the same in the first suit and this suit. The court will now look at the other considerations of the plaintiffs, the subject matter and the consent judgement.

THE PLAINTIFFS: CAPACITY

[17] Learned counsel for the first defendant had submitted that even though in the first suit, the plaintiffs had represented and sued on behalf of themselves and all the occupiers, holders and claimants of the alleged NCR at Sungai Sebakai, Sungai Tajem, Tatau, Bintulu over the lands at Rumah Luang/Rumah Nor in Sungai Tajem and Sungai Ipuh, Sebauh, Bintulu Division, Sarawak. In this suit, the plaintiffs once again claimed NCR over the same lands as in the first suit (Rumah Luang/Rumah Nor in Sungai Tajem and Sungai Ipuh, Sebauh, Bintulu Division, Sarawak).

[18] Learned counsel for the plaintiffs submitted relying on *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427; [1990] 2 CLJ (Rep) 169 that the first suit was brought as a representative action for all members of the alleged class who have a common interest, a common grievance and that the relief is in its nature beneficial to them all, was of a different and distinguishable feature from this suit where the 29 plaintiffs here are bringing this action on their own behalf against the defendants for their own personal interest over their individual lots and the reliefs sought by them are personal to them.

[19] The court finds that the plaintiffs had not rebutted the fact that the 29 claimants in this suit are the same or were not represented by the plaintiffs of the first suit (see para 3 of the reply affidavit). The fact of the presence of the first, 15th and 25th plaintiffs who were named as the original plaintiffs in a representative capacity in the first suit leads the court to conclude that the

parties in this suit were meant to be included in the first suit by the representative capacity of the original plaintiffs. What remains is whether the subject matter and the relief sought from the court will distinguish the capacity the plaintiffs in both suits had sued in.

SUBJECT MATTER OF CLAIM (MAP M1 AND MAP M)

[20] Learned counsel for the first defendant submitted the plaintiffs are precluded by res judicata from bringing a new suit on the same subject matter.

[21] Learned counsel for the plaintiffs in reference to their para 3 of the opposing affidavit submitted that the first suit and this suit are totally different. In the first suit the original plaintiffs had brought the action on their own behalf as well as on behalf of all the 35 other residents of the longhouse known as Rumah Ro ak Amot, Sg Teban Ulu, Labang, Sebauh, Bintulu, Sarawak claiming for the village's *pemakai menoa* over the NCR land (para 4(d) of the first statement of claim). In this suit according to para 4(d) of the statement of claim here, the 29 plaintiffs are bringing the action on their own behalf claiming for their individual 'temuda' land which is located within the boundary or 'garis menua' of the plaintiffs' communal lands locally referred to as 'pemakai menua' as shown in the Map M.

[22] Learned counsel for the first defendant submitted in reference to their para 3 of the reply affidavit that the individual 'temuda' land form part of the Rumah Ro or is within the plaintiffs' 'pemakai menua' claimed in the first suit and because of that the claims overlapped.

[23] The court refers to both para 4 of the first statement of claim and the statement of claim here (as set out and emphasised above) and would find that the respective plaintiffs in the first suit and this suit state that their claims rest on NCR established, inter alia, by 'temuda' land here. The nature of the claim in the first statement of claim and the statement of claim here are grounded on 'temuda' land. Looking at para 4(a) of the statement of claim here if the first, third, eighth, 11th, 13th, 15th, 19th 21st, 24th and 26th plaintiffs are all claiming 'temuda' land and not 'pemakai menua' it is odd for them not to be able to identify their plot of land they are farming in this suit's land, in other words these plaintiffs are actually claiming 'pemakai menua' on the rest of this suit's land that is not subject to the 'temuda' claim on the identified lots of the other plaintiffs within their NCR land.

[24] The court will find that the subject matter of the claims in the first statement of claim and the statement of claim here are the same, both resting on NCR created according to the first statement of claim through, inter alia, 'temuda' land within the NCR land and in this suit as 'temuda' land. The claim

against the first defendant over this suit's land (in Map M) and the claim against the first defendant over the first suit's land (in Map M1) are the same parcel of land within the NCR land (see under respective prayers para vii as set out above).

CONSENT ORDER

[25] Learned counsel for the first defendant submitted that by virtue of the consent order, the plaintiffs in this suit having agreed in the first suit that they would withdraw their claim without liberty to file afresh are bound by the consent order. It is an abuse of process and the plaintiffs are precluded from bringing a new suit on the same subject matter.

[26] Learned counsel for the plaintiffs submitted that there is no res judicata by the consent order as the capacity and the subject matter in the two suits are different.

[27] On the effect of a consent order, in *Malaysia National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165; [1997] 2 CLJ 351, Edgar Joseph Jr FCJ had approved this proposition p 181 (MLJ); p 369 b(CLJ):

> Similarly, in *Palmer & Anor v Durnford & anor* [1992] 2 All ER 122, the court had held that a consent order could give rise to a plea of res judicata …

[28] The nature and effect of a consent order is further elaborated in the case of *Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd v Kenneth Godfrey Gomez & Anor* [2011] 5 MLJ 219; [2010] 9 CLJ 702 where Ramly Ali JCA stated at p 219 (MLJ); p 711 (CLJ):

> [24] The consent order in the present case is founded on a contract or agreement between the parties based on both parties' willingness to submit to the discontinuance of the 1st suit on certain terms. Once the appellant and the respondents took the matter beyond contract and recorded a consent order then they must accept all the implications of a court judgment or order. In this sense the court now cannot vary the terms of the order. The application by the respondents for striking out the second suit under O 18 r 19 was in effect to enforce the terms of the agreement or contract and the said consent order.

[29] Ramly Ali JCA went on to expand this by saying (para 26 p 219 (MLJ); para 26 p 711G (CLJ)):

> If an order is made pursuant to the terms of settlement, that an action be dismissed or struck out by consent, the effect is not only to put an end to that action but also to preclude the plaintiff from bringing fresh proceedings based on the same cause of action. It operates as a judgment against the plaintiff and acts as an estoppel by record.

[30] Ramly Ali JCA had concluded that the consent order made there can give rise to res judicata because it was shown that the plaintiff had made representations to the defendants that it intended to withdraw its action 'without the liberty to file afresh' with no order as to costs. On that understanding the defendants agreed to withdraw their counterclaim against the plaintiff.

[31] The court notes that the first defendant had not filed any defence/counterclaim yet in this suit but had agreed to forgo cost in the consent order. The second defendant in the same boat as the first defendant had filed defence and counterclaim against the plaintiffs though. The court finds that the foregoing of cost (even though there is no indication that the first defendant would counterclaim like the second defendant) is sufficient consideration as a term of the settlement if that is a requirement to bind the plaintiffs in both suits to operate as an estoppel by record and for res judicata to apply.

[32] These authorities lead the court to agree with the submission of learned counsel for the first defendant that the original plaintiffs in the first suit which included the first, 15th and 25th plaintiffs in the present suit having agreed by the consent order that their first suit be struck out without liberty to file afresh had thereby relinquished their claim over the NCR land based on 'pemakai menua' which incidentally included 'temuda' land (as shown in para 4(d) of the first statement of claim which is exh WLC1 of the supporting affidavit) as laid out in Map M1.

[33] If that is the case of the first suit then the consent order would preclude the plaintiffs from bringing a new suit on the same subject matter ie claiming NCR over this suit's NCR land as 'temuda' land as laid out in Map M which is the very same parcel of land in Map M1 of the first suit. According to para 4(d) and (h) of the statement of claim here, the plaintiffs actually rely on their 'pemakai menua' to establish their 'temuda' land.

[34] According to the case of *Perspective Management Services Sdn Bhd v Seganom Sdn Bhd* [2004] 4 CLJ 466 the Court of Appeal had found that a consent order based on a suit for wrongful detention and conversion which sorted out the return of shares did estop by res judicata the parties from further litigating on the issue of damages for wrongful detention and return of the shares in a pending suit even though it was left out from the consent order. This case cited with approval *Henderson v Henderson* (1843) 3 Hare 100 where Wigram VC stated at p 115:

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

[35] The 'temuda' rights of the plaintiffs over the NCR land could have and in fact are part of the claims in both suits and if that is the case, then the court will find that the plaintiffs like the original plaintiffs are bound by res judicata.

[36] The court finds that it is an abuse of court process to allow the plaintiffs who had sued in a representative capacity for 39 NCR claimants for the NCR land (including the first suit land) through the first suit claiming NCR rights grounded, inter alia, on 'temuda' land which is then withdrawn without liberty to file afresh to then file afresh this suit under the respective names of the 29 plaintiffs for NCR rights grounded on 'temuda' land over this suit's land which is actually the first suit's land.

[37] Having regard to the pleadings and the circumstance of this matter, and applying the principles of law as stated above, this suit of the plaintiffs is frivolous and vexatious or is an abuse of the process of the court. The court would also exercise its inherent jurisdiction to strike it out.

CONCLUSION

[38] The first defendant's application to strike out the plaintiffs' writ and statement of claim against the first defendant is allowed with costs.

Defendants' application to strike out claim allowed with costs.

Reported by Kohila Nesan